

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

ROCIO ADAME ARAUJO DE AGUILAR, )  
et al., )

Plaintiff, )

vs. )

NATIONAL RAILROAD PASSENGER )  
CORPORATION, et al., )

Defendant. )

No. CV-F-02-6527 REC/LJO

ORDER GRANTING DEFENDANT  
COUNTY OF KERN'S MOTION FOR  
SUMMARY JUDGMENT (Doc. 109)

On October 11, 2005, the court heard defendant County of  
Kern's motion for summary judgment.

Upon due consideration of the record and the arguments of  
the parties, the court grants the County's motion for the reasons  
set forth herein.<sup>1</sup>

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<sup>1</sup>In resolving this motion, the court reviewed and considered  
all of the evidence submitted by the parties with two exceptions.  
The court did not consider the County's evidence that the occupants  
of the van had alcohol in their bloodstreams because the evidence  
submitted did not establish that the driver of the van had alcohol  
in his bloodstream, a fact the County conceded at oral argument.

1 This consolidated action involves complaints filed in five  
2 separate cases by the heirs of seven persons killed by a  
3 collision with an Amtrak train where the train tracks cross  
4 Poplar Avenue near Shafter, California. The County of Kern is  
5 named as a defendant by the plaintiffs in Rocio Adame Alfaro, et  
6 al. v. National Railroad Passenger Corporation, et al., No. CV-F-  
7 03-5632 REC/LJO and in Ester Aguilar v. National Railroad  
8 Passenger Corporation, et al., No. CV-F-03-5633 REC/LJO.

9 The County is moving for summary judgment against those  
10 plaintiffs who have sued it for damages on the ground that the  
11 County maintained a dangerous condition of public property that  
12 caused the deaths of plaintiffs' decedents. The County contends  
13 that it is entitled to summary judgment because the accident  
14 occurred on property that was not owned or controlled by the  
15 County; that the County's property was not in a dangerous  
16 condition; and/or that, if the property was in a dangerous  
17 condition, the County did not receive notice of it in time to  
18 correct the condition before the collision.

19 **A. County's Liability under California Government Code §**  
20 **835.**

21 **1. Governing Standards.**

22 California Government Code § 835 provides in pertinent part:

23 \_\_\_\_\_  
24 The court also did not consider evidence that the driver, Mario  
25 Aguilar, had had his license suspended twice for drunk driving and  
26 was driving on a suspended license at the time of the accident.  
See California Vehicle Code § 40832; Shmatovich v. New Sonoma  
Creamery, 187 Cal.App.2d 342 (1960).

1 Except as provided by statute, a public  
2 entity is liable for injury caused by a  
3 dangerous condition of its property if the  
4 plaintiff establishes that the property was  
5 in a dangerous condition at the time of the  
6 injury, that the injury was proximately  
7 caused by the dangerous condition, that the  
8 dangerous condition created a reasonably  
9 foreseeable risk of the kind of injury which  
10 was incurred, and ....

11 ...

12 (b) The public entity had actual or  
13 constructive notice of the dangerous  
14 condition under Section 835.2 a sufficient  
15 time prior to the injury to have taken  
16 measures to protect against the dangerous  
17 condition.

18 Government Code § 835.2(a) provides that a public entity has  
19 actual notice of a dangerous condition "if it had actual  
20 knowledge of the existence of the condition and knew or should  
21 have known of its dangerous character." Section 835.2(b)  
22 provides in pertinent part that constructive notice exists

23 only if the plaintiff establishes that the  
24 condition had existed for such a period of  
25 time and was of such an obvious nature that  
26 the public entity, in the exercise of due  
care, should have discovered the condition  
and its dangerous character.

27 **a. Ownership or Control of Dangerous Condition of**  
28 **Property.**

29 The County moves for summary judgment on the ground that it  
30 did not own or control the railroad crossing of Poplar Avenue  
31 where the accident occurred.

32 In their opposition brief, plaintiffs do not argue that the  
33 County owned or controlled the railroad crossing. Rather,

1 plaintiffs contend that there is a genuine issue of material fact  
2 that the southbound approach of Poplar Avenue to the railroad  
3 crossing is property owned and controlled by the County and that  
4 this approach to the railroad crossing is the dangerous condition  
5 of which plaintiffs complain.

6 There can be no dispute that the County owned and controlled  
7 Poplar Avenue to within two feet of the actual railroad crossing.  
8 Consequently, the issue is whether Poplar Avenue was a dangerous  
9 condition.

10 **b. Dangerous Condition.**

11 A "dangerous condition" of public property means a condition  
12 of the property that creates a substantial (as distinguished from  
13 a minor, trivial or insignificant risk of injury when such  
14 property is used with due care in a manner in which it is  
15 reasonably foreseeable that it will be used. Antenor v. City of  
16 Los Angeles, 174 Cal.App.3d 477, 482-483 (1985). Whether a  
17 given set of circumstances creates a dangerous condition is  
18 primarily a question of fact and may be resolved as a question of  
19 law only if reasonable minds can come to but one conclusion.  
20 Harland v. State of California, 75 Cal.App.3d 475, 484 (1977).

21 Plaintiffs argue that the configuration of southbound  
22 Poplar Avenue such that it intersects the railroad crossing at an  
23 oblique 45-degree angle creates a dangerous condition for  
24 motorists approaching the railroad crossing from the south.  
25 Plaintiffs refer to the declarations of their retained experts  
26 that a motorist arriving at the limit line north of the railroad

1 crossing has a limited view of the railroad tracks to the  
2 motorist's right and has to turn his or her head approximately  
3 135 degrees to see an approaching southeast bound train. Relying  
4 on this evidence, plaintiffs argue:

5       The placement of the stop/limit line on the  
6 pavement to the north of the tracks puts the  
7 motorist in a position where he is physically  
8 prevented from having clear view of on-coming  
9 southeast-bound train traffic. The angle of  
10 the intersection works against safety, making  
11 it difficult to locate traffic control  
12 devices so that they can be effectively seen.  
13 As a result, the configuration of the  
14 County's roadway at the intersection  
15 constituted a dangerous condition of public  
16 property.

17       However, as the County argues, the record submitted to the  
18 court, particularly the photographic evidence, establishes that  
19 the view of the railroad tracks to the northwest from the limit  
20 line for a southbound motorist is unobstructed to the horizon.  
21 In addition, the southbound motorist's view of the railroad  
22 crossing from Poplar Avenue is unobstructed. From 1,000 to 1,500  
23 feet north of the railroad crossing, a southbound motorist  
24 approaching the railroad crossing had an unobstructed view of the  
25 train tracks to the northwest. Southbound Poplar Avenue is  
26 clearly marked and signed for the approaching railroad crossing  
and is marked and signed in compliance with law. A southbound  
motorist had a unobstructed view of 480 feet of the train tracks  
to the northwest from 340 feet south of the railroad crossing.  
The railroad crossing itself has a train-actuated flashing signal  
device. Therefore, notwithstanding the opinions of plaintiff's

1 experts, the court concludes as a matter of law that the  
2 configuration of Poplar Avenue was not a dangerous condition  
3 within the meaning of the statute. The evidence before the court  
4 establishes that a southbound motorist was adequately warned by  
5 signage and pavement markings of the approaching railroad  
6 crossing and that the view from the limitline of the tracks to  
7 the northwest is unobstructed. The fact that the motorist has to  
8 turn his head further to the right to see a train approaching  
9 from the northwest than he would have to do at a 90-degree angle  
10 crossing does not negate these facts. Requiring a driver to turn  
11 his head to see if a train is approaching does not create a  
12 dangerous condition. See Balding v. Atchison, Topeka & Santa Fe  
13 Railway, 225 Cal.App.2d 254, 259-260 (1964), quoting Will v.  
14 Southern Pacific Co., 18 Cal.2d 468, 474-475 (1941).  
15 Furthermore, the evidence establishes that Mario Aguilar stopped  
16 or came to a near stop before crossing the railroad tracks,  
17 thereby establishing that he was aware of the railroad crossing  
18 before he passed the limit line.

19 **c. Injury Proximately Caused by Dangerous**  
20 **Condition.**

21 Assuming for purposes of argument that the configuration of  
22 Poplar Avenue is a dangerous condition, plaintiffs that summary  
23 judgment should be denied because it is undisputed that the  
24 condition proximately caused the accident. In so contending,  
25 plaintiffs that Mario Aguilar either stopped his vehicle or came  
26 to a near stop as he approached the railroad crossing and then

1 pulled into the path of the train. Plaintiffs contend: "A very  
2 reasonable inference exists that the driver of the van had no  
3 warning of the train and did not see the train as a result of the  
4 configuration of the road."

5 Because the court concludes that the configuration of Poplar  
6 Avenue was not a dangerous condition, the court need not address  
7 plaintiffs' position. However, the record before the court is  
8 disputed whether the train's warning horn was sounding and  
9 whether the train-actuated signal device was operating at the  
10 time of the accident. These factual disputes do not raise a  
11 genuine issue of material fact regarding the County's liability  
12 because the record establishes as a matter of law and fact that  
13 the County has no ownership or control over these devices.  
14 However, if the court had concluded that the configuration of  
15 Poplar Avenue raises a question of fact regarding whether it is a  
16 dangerous condition, the court would further conclude that the  
17 County is not entitled to summary judgment on the issue of  
18 proximate causation.

19 **d. Reasonably Foreseeable Risk of Kind of Injury**  
20 **That Occurred.**

21 Assuming that the configuration of Poplar Avenue is a  
22 dangerous condition, plaintiffs argue that the County is not  
23 entitled to summary judgment with regard to this element of  
24 liability. Plaintiffs contend that the configuration of  
25 southbound Poplar Avenue as it crossed the railroad tracks  
26 created a risk that a motorist would not see a train approaching

1 from the northwest, would enter the railroad crossing in front of  
2 the train, be struck by the train and suffer injuries or death.  
3 Plaintiffs argue that the fact that third party negligence is a  
4 concurring proximate cause of the injury does not preclude  
5 liability of the County for the dangerous condition of Poplar  
6 Avenue, provided that the kind of injury that occurred was  
7 reasonably foreseeable.

8 In making this latter argument, the court assumes that  
9 plaintiffs are referring to the possible negligence of Mario  
10 Aguilar and/or the railroad. In this regard, plaintiffs'  
11 position is a correct statement of the law. Liability for a  
12 dangerous condition of property cannot be premised upon third  
13 party conduct alone. Peterson v. San Francisco Community College  
14 Dist., 36 Cal.3d 799, 810 (1984). Such liability may arise only  
15 where third party conduct is coupled with a dangerous condition  
16 of the property. Id.

17 Because the court has concluded that the configuration of  
18 Poplar Avenue is not a dangerous condition, the court need not  
19 address plaintiffs' position. However, if the court had  
20 concluded that the configuration of Poplar Avenue raises a  
21 question of fact regarding whether it is a dangerous condition,  
22 the court would conclude that the County is not entitled to  
23 summary judgment on the issue of reasonably foreseeable risk.

24 **e. County's Actual or Constructive Knowledge of**  
25 **Dangerous Condition.**

26 Assuming that the configuration of Poplar Avenue is a



1 dangerous condition, plaintiffs argue that the County is not  
2 entitled to summary judgment with respect to this element because  
3 the County had actual or constructive notice of the dangerous  
4 condition.

5 Government Code § 835.2(a) provides that a public entity has  
6 actual notice of a dangerous condition "if it had actual  
7 knowledge of the existence of the condition and knew or should  
8 have known of its dangerous character." Section 835.2(b)  
9 provides in pertinent part that constructive notice exists

10 only if the plaintiff establishes that the  
11 condition had existed for such a period of  
12 time and was of such an obvious nature that  
13 the public entity, in the exercise of due  
14 care, should have discovered the condition  
15 and its dangerous character.

16 In so arguing, plaintiffs refer to the records of accidents  
17 at the Poplar Avenue railroad crossing maintained by the County.  
18 Plaintiffs contend that the County had notice of eleven accidents  
19 at the railroad crossing before the accident at issue.

20 Because the court concludes that the configuration of Poplar  
21 Avenue is not a dangerous condition, the court need not address  
22 plaintiffs' position. However, if the court had concluded that  
23 the configuration of Poplar Avenue is a dangerous condition, the  
24 court would grant summary judgment for the County on this issue.

25 As the County argues, the evidence establishes that only  
26 three accidents prior to the one at issue involved a vehicle  
traveling southbound on Poplar Avenue. One of the three  
accidents occurred in 1965 before the train-actuated signal

1 device was installed. Furthermore, the CHP investigating officer  
2 noted that visibility was good for the driver of the vehicle and  
3 that the investigating officer discussed bringing criminal  
4 charges against the driver because the driver was the cause of  
5 the accident. The second accident involving a southbound vehicle  
6 occurred in 1975.<sup>2</sup> The driver in a commercial truck pulling a  
7 trailer filled with cotton seed drove the truck and most of the  
8 trailer over the railroad tracks. The report states that the  
9 driver failed to notice the train and that the train signals were  
10 working at the time of the investigation. The third accident  
11 involving a vehicle southbound on Poplar Avenue occurred in 1997.  
12 According to the accident report, the driver of the vehicle was  
13 slowing as he approached the railroad crossing. The driver of  
14 the southbound vehicle drove into the side of the train which  
15 already in the intersection at the time of the collision,  
16 striking the second engine. The occupants of the vehicle fled  
17 the scene prior to the investigation. None of the accident  
18 reports prepared by the CHP attribute the cause of the accident  
19 to the angle at which southbound Poplar Avenue crosses the  
20 railroad tracks. As the County argues, these three accidents as  
21 detailed in the CHP accident reports did not suffice to give the  
22 County actual notice that the configuration of Poplar Avenue was  
23 a dangerous condition. The first accident occurred 36 years

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24  
25 <sup>2</sup>It is noted that the accident report actually states that the  
26 driver of the vehicle was traveling west on Poplar Avenue - which  
is impossible. However, from the drawing of the accident on the  
report, the driver was southbound on Poplar Avenue.

1 before the accident at issue and occurred before the train-  
2 actuated signal device was installed. The second accident  
3 occurred ten years later and was not caused by the configuration  
4 of Poplar Avenue but because the driver failed to pull the  
5 trailer off the tracks before the train arrived. In the third  
6 accident, the driver actually drove into the side of the train  
7 and then fled the scene, thereby negating any conclusion that the  
8 driver failed to see the train because of the configuration of  
9 Poplar Avenue.

10 Plaintiffs further argue that the County had actual  
11 knowledge of the dangerous condition caused by the configuration  
12 of Poplar Avenue as it crossed the railroad tracks because the  
13 County regularly inspected its roads every two weeks, which  
14 inspections included line-of-sight dangers where roads crossed  
15 railroad tracks.

16 However, in the absence of any indication that any of these  
17 inspections caused the County to consider the Poplar Avenue  
18 crossing dangerous because of the configuration of the road as it  
19 approached and crossed the tracks in a southbound direction, the  
20 fact of inspections is not probative that the County had actual  
21 knowledge of a dangerous condition.

22 Plaintiffs further contend that the County had actual notice  
23 because of the evidence from plaintiffs' experts that accidents  
24 at the location far exceeded the statistical norm for such an  
25 intersection. Plaintiffs refer to the Federal Railroad  
26 Administration Predicted Accident Formula as predicting that this

1 railroad crossing would have an accident history of one crash  
2 every 9.5 years. Because, plaintiffs argue, the evidence  
3 establishes that there were 11 accidents at the railroad crossing  
4 before the accident at issue, the County had actual knowledge of  
5 the dangerous condition.

6 However, plaintiffs base the dangerous condition as the  
7 configuration of Poplar Avenue as it approached the railroad  
8 crossing from the south. Consequently, as the County argues, the  
9 accidents that are relevant to plaintiffs' case are those  
10 accidents involving a collision by a southbound vehicle with a  
11 southeast bound train. As noted, only three such collisions  
12 occurred and the circumstances of all of those collisions differ  
13 from that involving the accident before the court. In addition,  
14 the County notes that plaintiffs' experts assert that Poplar  
15 Avenue had an average daily traffic of 510 vehicles in 1991,  
16 meaning that approximately 186,150 cars crossed the railroad  
17 tracks annually. As the County contends:

18 If projected over the 35 years that the train  
19 actuated warning devices were in place, this  
20 means (after subtracting out the eight cars  
21 involved in accidents) that 6,515,242 million  
22 cars traveled over the railroad crossing  
23 without incident. The suggestion that eight  
24 accidents (even though six do not apply to  
the current circumstances) out of more than  
6.5 million vehicles traveling over the  
railroad tracks, should have placed the  
County on notice of a dangerous condition is  
ludicrous.

25 See Callahan v. City and County of San Francisco, 15 Cal.App.3d  
26 374, 379 (1971):

1 We have concluded that the summary  
2 proceedings have clearly eliminated the issue  
3 of negligence of the City in either  
4 permitting a dangerous condition to exist or  
5 of any negligent maintenance. It has shown  
6 that despite a heavy volume of daily  
7 automobile traffic, no other such accident  
8 had occurred over a period of four and one-  
9 half years. ....

10 The statistics of vehicle traffic at the  
11 intersection ... show that in excess of 19  
12 million vehicles traversed the intersection  
13 during a period of four and one-half years  
14 prior to the accident. The paucity of  
15 accidents occurring during this time clearly  
16 indicates that the intersection was a safe  
17 one except for drivers described by the  
18 witness here, i.e., 'maniacal' or driving at  
19 excessive and hazardous speed.

20 Plaintiffs further argue that summary judgment for the  
21 County is not appropriate because of evidence from which it may  
22 be inferred that the County had constructive notice of the  
23 dangerous condition to southbound traffic on Poplar Avenue  
24 crossing the railroad tracks.

25 In so contending, plaintiffs refer to the evidence that the  
26 County applied to the PUC for a gate crossing at the intersection  
in 1987 through 1997.

Although the County concedes that it applied to the PUC for  
the gate crossing, the County notes that it applied to the PUC  
for such gate crossings at every railroad crossing in the County  
which did not already have one. Consequently, as the County  
contends, the fact of the PUC applications does not permit the  
inference that the County applied for the gate crossing at the  
subject intersection because it had notice of the dangerous

1 configuration of southbound Poplar Avenue with respect to  
2 southeast bound trains at the railroad crossing. Given the  
3 annual volume of traffic crossing the railroad tracks on Poplar  
4 Avenue, the low number of accidents occurring between trains and  
5 motorists southbound on Poplar Avenue and the fact that the  
6 circumstances of only one of those accidents is similar to that  
7 before the court, which accident occurred prior to the  
8 installation of the train-actuated signal device, and the  
9 evidence that the County applied for crossing gates on all  
10 railroad crossings in the County which did not have them, the  
11 County is entitled to summary judgment that it did not have  
12 actual or constructive knowledge that the configuration of  
13 southbound Poplar Avenue as it crossed the railroad tracks was a  
14 dangerous condition, assuming solely for purposes of resolution  
15 of this aspect of the motion that it constituted a dangerous  
16 condition.

17 **f. Dangerous Railroad Crossing.**

18 Plaintiffs' further argue that summary judgment for the  
19 County should be denied because "[t]he dangerous railroad  
20 crossing immediately adjacent to the County's roadway exposed  
21 motorists using Poplar Avenue to a substantial risk of injury."  
22 Plaintiffs contend that "[p]ublic entity liability may also arise  
23 under section 835 of the Government Code if a condition on  
24 adjacent property exposes those using the public property to a  
25 substantial risk of injury."

26 Plaintiffs' position does not suffice to withstand summary

1 judgment on this ground.

2 In so contending, plaintiffs place primary reliance on Shea  
3 v. City of San Bernardino, 7 Cal.2d 688 (1936). In Shea, the  
4 plaintiff was injured when the car in which she was riding as a  
5 passenger, traveling on a city street at normal speed, hit a bad  
6 bump at the railroad crossing. Affirming judgment for the  
7 plaintiff, the Supreme Court held:

8 ... In giving consideration to appellant's  
9 contention that the city was powerless to  
10 remedy the defect the above-mentioned  
11 hypothesis will be assumed to be correct.  
12 Nevertheless, the contention is not  
13 impressive. It must be remembered that the  
14 improvement of streets within the boundaries  
15 of a city is an affair in which the city is  
16 vitally interested. The governing board and  
17 officers of the municipality in dealing with  
18 such an affair may not complacently declare  
19 that they were powerless over a long period  
20 of years to take any steps to remedy a  
21 defective and dangerous condition that  
22 existed in one of the principal streets of  
23 the city. If the railroad commission had the  
24 exclusive jurisdiction to order the north  
25 track to be lowered it was the duty of the  
26 city at some time during the six year period  
to call upon the railroad commission to order  
the rail to be lowered and thus to remove an  
obviously dangerous condition in the street.  
Finally, if it be assumed that the city was  
entirely powerless in the premises, had not  
control over the right of way, and was  
entitled, so far as the condition which  
existed at the right of way was concerned, to  
rely on the lack of power and control to  
relieve it from liability, it was  
nevertheless not relieved from the duty to  
warn persons lawfully using the street that a  
dangerous condition existed.

7 Cal.2d at 693.

Plaintiffs argue that, because the County had unsuccessfully

1 applied to the PUC for a gate crossing at the Poplar Avenue  
2 railroad crossing, the County could have closed Poplar Avenue at  
3 the railroad crossing or re-aligned Poplar Avenue to cross the  
4 railroad tracks at a 90-degree angle instead of sitting "idly by  
5 as the motorist continued to traverse the dangerous railroad  
6 crossing."

7       Here, however, the southbound motorist was warned of the  
8 railroad crossing by lawful signage and road markings. Thus, the  
9 court is not faced with a situation in which no warning of the  
10 upcoming railroad crossing was given to the motorist. As the  
11 County argues, the duty to warn arises only when the condition is  
12 not reasonably apparent to those using the road. See Bunker v.  
13 City of Glendale, 111 Calliope.3d 325, 328 (1980). Plaintiffs'  
14 contention that the configuration of southbound Poplar Avenue  
15 constituted a trap suggests that the angle of the road was not  
16 reasonably apparent to a driver. However, as the County  
17 contends, this argument "fails due to its own internal logic."  
18 First, the fact that Aguilar stopped or nearly stopped before  
19 crossing tracks establishes that he was aware of the railroad  
20 crossing. Consequently, the County's signs and pavement markings  
21 warning of the railroad crossing were successful. Furthermore,  
22 the angle at which southbound Poplar Avenue crossed the railroad  
23 tracks would have been reasonably apparent to the southbound  
24 motorist as demonstrated by photographs of the scene. And as  
25 noted above, the view from the limit line of the tracks to the  
26 northwest is unobstructed. Thus, the direction and location of



1 the railroad tracks were apparent such that no further warning  
2 was needed. Furthermore, as the County argues, its ability to  
3 warn is limited to informing the driver of the existence of the  
4 railroad crossing:

5 Signs and pavement markings are static and  
6 are incapable of notifying a driver of the  
7 changing situation of a train being present.  
8 Thus, the duty of warning of the presence of  
9 a train is placed upon the railroad who has  
10 the knowledge as to whether a train is  
11 present. In turn, the railroad uses the  
12 devices authorized for each unique crossing  
13 by the Public Utilities Commission for that  
14 purpose.

15 Finally, the County had no authority to close or realign  
16 Poplar Avenue at the railroad crossing. The County's authority  
17 to close a road is limited by California Streets and Highway Code  
18 § 8324, which pertains to hearings in connection with  
19 applications to vacate roadways and easements and provides in  
20 pertinent part:

21 (b) If the legislative body finds, from all  
22 the evidence submitted, that the street,  
23 highway, or public service easement described  
24 in the notice of hearing or petition is  
25 unnecessary for present or prospective public  
26 use, the legislative body may adopt a  
resolution vacating the street, highway, or  
public service easement. The resolution of  
vacation may provide that the vacation occurs  
only after the conditions required by the  
legislative body have been satisfied and may  
instruct the clerk that the resolution of  
vacation not be recorded until the conditions  
have been satisfied.

27 Therefore, the County could not have closed Poplar Avenue absent  
28 a finding that Poplar Avenue is "unnecessary to present or  
29 prospective public use." The plaintiffs' contention that Poplar

1 Avenue could be closed without inconvenience to the public is  
2 without evidentiary support. Furthermore, the PUC has the  
3 exclusive power pursuant to California Public Utilities Code  
4 Section 1202

5 (a) To determine and prescribe the manner,  
6 including the particular point of crossing,  
7 and the terms of installation, operation,  
8 maintenance, use, and protection of each  
9 crossing ... of a public or publicly used  
10 road or highway by a railroad ... and of a  
11 street by a railroad or of a railroad by a  
12 street.

13 (b) To alter, relocate, or abolish by  
14 physical closing any crossing set forth in  
15 subdivision (a).

16 See also California Streets and Highways Code § 120 ("With the  
17 consent and approval of the Public Utilities Commission, the  
18 department may abandon that portion of any state highway which  
19 crosses the tracks or right of way of any railroad or street  
20 railroad, and may close such crossing.") Therefore, as the  
21 County argues, the suggestion that the County could vacate Poplar  
22 Avenue and, with vacation, abolish the railroad crossing, is  
23 contrary to law.

24 ACCORDINGLY:

25 1. Defendant County of Kern's motion for summary judgment  
26 is granted.

IT IS SO ORDERED.

Dated: December 29, 2005  
668554

/s/ Robert E. Coyle  
UNITED STATES DISTRICT JUDGE